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No. 90 - 372

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

ROBERT GIGANTE,

Petitioner,

v.

RUNSHIP, LTD., and
LAURITZEN REEFERS, A/S,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

REPLY TO BRIEF IN OPPOSITION AND SUPPLEMENTAL APPENDIX

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REPLY TO BRIEF IN OPPOSITION

Although conceding that the decision below is in conflict with the decision of the Fifth Circuit in *Woods v. Sammisa Co., Ltd., et al*, 873 F.2d 842 (5th Cir. 1989), *cert. denied*, 107 L.Ed.2d 847 (1990), as well as with the decision of the Ninth Circuit in *Turner v. Japan Lines*, 651 F.2d 1300 (9th Cir. 1981), *cert. denied*, 459 U.S. 967 (1982), respondents nonetheless assert that a Writ of Certiorari should be denied because "even under the Fifth Circuit's decision in *Woods*" summary judgment was properly granted in the present case. This argument is without merit

for several reasons. First, it is based on a misstatement of Petitioner's theory of liability. Secondly, it is based on a patently erroneous interpretation of the *Woods* decision. Third, it ignores the fact that the decisions below in the instant case, both in the District Court and in the Third Circuit, were based exclusively on the Third Circuit's decision in *Derr v. Kawasaki Kisen K.K.*, 835 F.2d 490 (3rd Cir. 1987), the decision which respondents admit is in conflict with the Fifth Circuit's decision in *Woods*. Finally, respondents devote a considerable portion of their Brief in Opposition to arguing that the decision in *Derr* is correct and that *Woods* is wrong, an argument which simply emphasizes the existence of the conflict in Circuits and which in no way supports the contention that "even under the decision in *Woods*" summary judgment was properly granted in the instant case.

I.

Initially, respondents assert that petitioner erroneously states in the Petition that respondent determined the size of the "key". This is not correct. Rather, at page 5 of the Petition, it is stated that there was evidence that respondent Lauritzen Reefers, A/S "instructed" the foreign stevedore with respect to the size of the keys to be created, meaning that respondent, Lauritzen Reefers A/S, "transmitted" this information to the loading stevedore. There is ample evidence in the record to support this statement.[1] The facts, as

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1. It is important to bear in mind that the case below was decided on motion for summary judgment. It is fundamental that in resolving such a motion all the facts and the inferences reasonably to be drawn therefrom are to be interpreted in the light most favorable to the party opposing the motion, *i.e.*, -- petitioner. Respondents ignore this principle with many of the arguments in the Brief in Opposition actually being factual arguments which either are contradicted by other evidence in the record or are based on inferences which are subject to a different interpretation by the fact finder. To the extent that respondents are arguing that summary judgment was properly entered "even under the *Wood*'s decision," they are making a factual argument where the inferences to be drawn

set forth in the testimony of respondents' representative, a Captain Claus Pavar, were as follows.

Lauritzen Reefers A/S was the representative of fourteen vessels that were bringing fruit to the port of Philadelphia during the 1985 season (1b).[2] Holt Cargo Systems, petitioners' stevedore employer, was hired by Lauritzen Reefers A/S to discharge the fruit from these fourteen vessels (1c). In conjunction with the negotiating of this contract, it was understood that Holt Cargo Systems would be using the chandelier spreaders as the method of discharge (2c)[3] and that this required that a "key" be created in the

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from the facts are in dispute and, therefore, would not support the granting of summary judgment.

2. Page references followed by the letter "a" are to the Appendix filed with the Petition. Page references followed by the letter "b" are to the Supplemental Appendix filed with the Brief in Opposition. Page references followed by the letter "c" are to the Supplemental Appendix filed with this Reply Brief.

3. The method of discharging the cargo, *i.e.*, -- the use of chandelier spreaders, was a factor in determining the speed and ease with which the cargo could be discharged and, therefore, was a factor in determining the unit or tonnage rate to be paid the discharging stevedore (Holt) by respondent Lauritzen Reefers, A/S for discharging the fruit cargo (5b-6b).

The fact that plaintiff's employer, Holt, may not have recognized the danger created by the small size of the keys does not excuse the vessel from liability. As the was noted in *Moore v. M.P. Howlett*, 704 F.2d 39, 43 (2nd Cir. 1983):

> We disagree with the district judge's evaluation of the evidence. His determination was premised on his finding that since neither plaintiff nor the stevedore anticipated harm from the obvious hazard, it was unreasonable to hold the shipowner liable for failing to anticipate that harm. *The fact that neither plaintiff nor the stevedore took any precautions in the face of this hazard does not relieve defendant of responsibility, for it is funda-*

stow at each deck level by the loading stevedore. As a result of the discussions between Holt Cargo Systems (the discharging stevedore) and respondent, Lauritzen Reefers A/S, it was understood that the size of the key to be created would be large enough to permit the use of the chandelier spreaders, but not larger than that (6b). This information was then transmitted to the loading stevedore in Chile who actually made the determination of the size of each individual key in the course of its performing of the loading operation. However, as set forth in the Petition, and not denied by respondents, the size of the key was made known to the vessel in the person of its port captain who was present in the loading port, through the providing of a stowage plan which showed the location and size of the key, through the acceptance by the captain of the vessel who certified that the stowage was performed to his entire satisfaction, and by the observation of Captain Pavar as the port captain in the discharging port, who admitted that he also was aware of the size of the keys that were being created.

Petitioners' theory of liability, and the basis of the conflict between the decision below and the views of the Fifth Circuit as set forth in *Woods v. Sammisa Co., Ltd., et al, supra, Harris v. Flota Mercante Grancolombiana, S.A.*, 730 F.2d 296 (5th Cir., 1984), and *Lemon v. Bank Lines, Ltd.*, 656 F.2d 110 (5th Cir., 1981), does not rest on the contention that the vessel "created" the unsafe condition in the cargo stow, but, rather, that the vessel had "knowledge" of the unsafe condition that was being created in the cargo stow and failed to take action to remedy it, *cf. Woods, supra*, 873 F.2d at 851 (39a). In the instant case, there is ample evidence to support a finding of such knowledge, and, therefore, create a clear and unequivocal conflict

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> *mental that there may be more than one proximate cause of an injury. Thus, the jury could have found that the stevedore, shipowner, and plaintiff all unreasonably believed that the longshoreman could perform his duties on the barge without injury.* (Emphasis supplied)

between the views of the Third Circuit and the views of the Fifth Circuit.

II.

Respondents next argue, citing *Woods* as authority, that the Writ should be denied because in the instant case there was no evidence that the vessel "knew or should have known" that the condition of the stow created a hazardous condition whereas, in *Woods*, there was evidence that the owner knew or should have known of the danger involved (see Brief in Opposition at page 8). In short, while respondents admit knowledge of the facts of the condition, *i.e.*, the size of the keys, they deny that they knew that this created an unsafe condition. Were this unique theory of defense to be recognized, a shipowner could be held liable only if it *admitted* that a condition was unsafe, thereby completely negating the concept of the duty to exercise reasonable care under the circumstances. Contrary to the assertions in the Brief in Opposition, a similar argument also was made on behalf of the shipowner in *Woods v. Sammisa Co., Ltd., et al, supra*, and was unequivocally rejected by the Fifth Circuit as follows 873 F.2d at 851 (38A-40A):

> The defendants offer two arguments against this conclusion. Firstly, they assert that, although there was evidence that the overlapping condition of the cargo meant that the discharge would have to proceed "slowly," there was no evidence that the condition of the cargo presented an unreasonable risk of harm to the longshoremen. *Secondly, they contend that there was no evidence that the defendants, through their employees, had any knowledge that the stow presented an unreasonable risk of harm.*
>
> . . .
>
> The defendants' second argument is similarly without merit. *They do not and cannot deny that they were*

aware of the overlapping condition of the cargo; the record establishes beyond doubt that the owner/operator knew in Brazil that the cargo was being stowed in an overlapping fashion and that the overlap continued to exist when discharge operations began in New Orleans. *Cf. Lemon*, 656 F.2d at 116. *Their contention is only that they did not have actual knowledge of the danger which this condition presented such that liability may attach under Scindia.*

But the defendants misread *Scindia*. Under the first *Scindia* duty, there is no requirement that the vessel have actual knowledge of the danger presented before liability will attach. Rather, that duty speaks only in terms of a failure to exercise due care (although we measure its duty with regard to, not the ordinary stevedore, but an "expert and experienced" stevedore exercising "reasonable care"). The law of negligence has never required that a tortfeasor actually be aware of the risks which its actions create before it may be held liable, and *Scindia* does not add such a requirement in this context. *See Harris*, 730 F.2d at 299 (defendants may be liable under the first duty "[in] situations where the [defendants] knew or should have known of the dangerous condition") (emphasis added). *All that is required is that the injury that results from the failure to exercise due care be reasonably foreseeable--and in this case a reasonable owner/operator and time charterer would have perceived the dangers presented by the overlapping condition of the cargo.* (Emphasis supplied)

III.

In arguing that summary judgment would be proper in the instant case even under the *Woods* decision, respondents are simply ignoring what was stated by the District Court and the Third Circuit in the decisions below. The District Court clearly based its decision exclusively on the decision in *Derr, supra*, even going so far as to specifically state that

it was following this Court's decision in *Scindia* "only to the extent to which it has been adopted by the Third Circuit in Derr" (10a).

The importance of *Derr* as the basis for the decisions below was then emphasized by the Third Circuit which cited it as its *sole* reason for affirming the decision of the District Court (25a), following which Judge Becker, who was a member of the panel which originally decided the appeal, stated on the motion for rehearing that he would grant rehearing so that the court *in banc* might reconsider *Derr* (17a).

In view of this history, the argument that summary judgment would have been granted under the decision in *Woods* without the *Derr* decision is patently without merit.

IV.

Finally, respondents argue that this Court should deny a Writ of Certiorari because the views of the Third Circuit, as expressed in *Derr* are in accord with this Court's decision in *Scindia* (Brief in Opposition at pages 4-7). However, as set forth in the Petition, the views of the Third Circuit in *Derr* are based on an interpretation of *Scindia* which equates the position of the foreign loading stevedore, who is not the plaintiff's employer, with that of the discharging stevedore who has no ability to control the manner in which the loading stevedore performed its work. For the reasons set forth in the Petition, this equating of the foreign stevedore with the limited duties placed on the plaintiff's employer goes to the heart of the conflict which currently exists in the decisions of the Circuit Courts, a conflict which, it is submitted, urgently requires resolution by this Court.

CONCLUSION

The existence of a conflict in Circuits and the substantiality of the question presented have not and can not be denied. Respondents' assertion that summary judgment properly would have been granted even under the Fifth Circuit's decision in *Woods v. Sammisa Co., Ltd., et al, supra*, is not supported by the record, and, indeed, is refuted by the decision of both the District Court and the Court of Appeals below.

The record in this case raises in a clear and precise manner the issue of a shipowner's responsibility for the manner in which cargo is stowed by a foreign stevedore. In view of the number of cases that have been and will be affected by the decision in *Derr*, it is important that this aspect of the shipowner's duty of care be clarified. Accordingly, it is submitted that a Writ of Certiorari should issue to review the judgment below.

Respectfully submitted,

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SUPPLEMENTAL APPENDIX

Excerpt from Court of Appeals Appendix - 84A

CROSS-EXAMINATION

BY MR. SOVEL:

Q. Captain Pavar, Holt Cargo Systems was hired to discharge this cargo by Lauritzen Reefers, was it not?

A. That's correct.

Q. Who from Lauritzen Reefers negotiated the agreement with Holt Cargo Systems for the stevedoring services on the various fruit vessels?

A. The agreement was negotiated -- negotiated with -- by the fleet manager, Jorgen Paulsen, and Holt.

Q. Did you participate in that?

A. No, not for -- for this-- for this freight here, no.

Q. How did you learn about the agreement?

A. From Jorgen Paulsen.

Q. Do you have a copy of the agreement?

A. I have not.

Q. You don't? You never were provided a copy of the agreement with Holt System?

Excerpt from Court of Appeals Appendix - 85A

A. No, no.

Q. In connection with the agreement with Holt, did you understand that they were going to be using these chandelier spreaders in the discharging of the cargo?

A. Yes.

Q. Was the use of forklift trucks in the hold also understood at the time the contract was negotiated?

A. Yes.

Q. What I'm getting at, Captain, the -- in negotiating the contract, it was understood that Holt would be using the chandelier spreaders to take out the cargo and using forklift trucks in the hold to bring those units that were in the wings of the hold into the center where they could be affixed to the chandelier spreader?

A. Yes.

Q. You knew that that was the method of discharge?

A. Oh, yes.

Q. In doing this, was there any discussion with Holt as to the size of the key that would be provided for them to begin their operation?

A. Of course there must have been a discussion of that, because they'll need a certain area to get in the chandeliers.